1998

Remi A. Mabus v. G. Barton Blackstock, Bureau Chief, Driver license Division, Department of Public Safety, State of Utah : Brief of Appellant

Utah Court of Appeals

D. Scott Little; Attorney for Appellee.
James H. Beadles; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

REML A. MABUS, PETITIONER/APPELLEE, V. G. BARTON BLACKSTOCK, BUREAU CHIEF, DRIVER LICENSE DIVISION, DEPARTMENT OF PUBLIC SAFETY, STATE OF UTAH, RESPONDENT/APPELLANT.	DOCKET NO. 981668 *PRIORITY NO. 14* **CASE NO. 981668-CA**

BRIEF OF APPELLANT

APPEAL FROM THE TRIAL COURT'S REINSTATEMENT OF MABUS'S LICENSE, REVERSING THE FINAL AGENCY ORDER OF THE DIVISION THAT HAD REVOKED HIS LICENSE IN AN INFORMAL ADJUDICATIVE PROCEEDING IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE STEPHEN L. HENRIOD, PRESIDING

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NATURE OF THE CASE AND JURISDICTIONAL BASIS

This case is an appeal from the trial de novo review of an informal adjudicative proceeding in which the trial court reinstated Mabus's driver's license, overturning the agency's final order. This Court has original appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(a) (1996).

APPELLATE ISSUES AND STANDARDS OF REVIEW

1. Is the requirement in Utah Code Ann. § 44-6-44.10 (1995) that an officer send the division a copy of the citation within 5 days a jurisdictional prerequisite to suspension or revocation of a driver's license? Interpretation of section 44-6-44.10 is a matter of law, and this Court gives no deference to the trial court. *Berube v. Fashion Centre Ltd.*, 771 P.2d 1033, 1038 (Utah 1989); *State v. Krueger*, slip op. at 2, No. 981035-CA (Utah App. Feb. 25, 1999).

2. If the division had the responsibility to prove that the officer sent in his citation within 5 days, did petitioner waive the issue by not listing it in his petition for judicial review under Utah Code Ann. § 63-46b-15 (1996). Interpretation of this statute is also a matter of law. *Berube*, 771 P.2d at 1038; *Krueger*, slip op. at 2.

PRESERVATION

Respondent's objections were raised during the trial (Tr. Trial, August 12, 1998 at 37-39).[1]

RELEVANT PROVISIONS

Pertinent statutes are quoted as necessary in the text.

STATEMENT OF THE CASE

Procedural History

Because of his refusal to take an intoxilyzer test, the Drivers' License Division revoked Mabus's license for one year (R. 5). Mabus filed a timely petition for judicial review and an evidentiary hearing was held on August 12, 1998 (*Id.*). The petition alleged a plethora of violations in the revocation process, but not that the paperwork was filed too late (R. 1-3). At the conclusion of the evidentiary hearing, during his closing argument, Mabus alleged that the division failed to establish what he called a necessary element, i.e., that the peace officer who arrested Mabus sent in the DUI report to the division within five days (Tr. at 37). Mabus based his claim on *Moore v. Schwendiman*,

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[1] The trial transcript is not paginated as part of the record.

750 P.2d 204 (Utah App. 1988) (*Id.*). The trial court agreed with Mabus's reading of *Moore* and reinstated his license (Tr. at 38).

Statement of Facts

At 1:30 in the morning on January 18, 1998, Officer Paul Cardall, a reserve officer with the Bountiful City Police Department saw Mabus, who was driving a maroon Corvette, stop at a green light (R. 12). Mabus turned westbound and straddled the middle line before going back into the left-hand lane (*Id.*). Suspecting possible impairment, Officer Cardall turned on his overhead lights and Mabus stopped his car (R. 13).

As soon as the officer began talking with Mabus, he smelled alcohol and saw that Mabus's pants were unbuttoned (*Id.* 13-14). Officer Cardall conducted field sobriety tests, including horizontal gaze nystagmus, the one-leg stand, and the walk and turn (*Id.* at 14-17). He failed the nystagmus test, the walk-and-turn test, and refused to do the one-leg stand (*Id.*). Based on these failures, Officer Cardall arrested Mabus and took him to the local station house for an intoxilyzer test (*Id.* at 17).

Another Bountiful City Officer, Todd Mia, read Mabus the admonitions for the intoxilyzer test (*Id.* at 33). He gave him four opportunities to take the test, but each time Mabus refused, saying "I think I will turn it down" (*Id.*).

SUMMARY OF THE ARGUMENT

Five-day rule not a jurisdictional prerequisite. The trial court failed to recognize that the statutory language containing the five-day rule had changed

fundamentally since *Moore*, even though this Court, in a footnote to that case, recognized the change.

Petitioner's failure to allege error in petition. Petitioner did not allege in his petition for judicial review that the officer had failed to send in the report within five days; consequently, he waived it.

ARGUMENT

I. THE 1984 STATUTE THAT WAS THE BASIS FOR THE APPELLATE COURT'S *MOORE* DECISION WAS AMENDED IN 1988 AND NO LONGER CONTAINS THE PROVISION UPON WHICH PETITIONER RELIES; CONSEQUENTLY, RELIANCE UPON *MOORE* IS INCORRECT.

Contrary to petitioner's representation to the trial court, *Moore v. Schwendiman*, 750 P.2d 204 (Utah App.1988), is no longer good law, having been abrogated by new statutory provisions enacted in 1988 and still in effect today. The sole footnote in *Moore* specifically states that the analysis in that opinion is confined to the statute in effect in 1984, when Moore was arrested. *Moore*, 750 P.2d at 206 n.1. The appellate court, in that footnote, then proceeded to explain why the result would be different under the 1988 amendment. With minor changes in wording and numbering, the substance of the 1988 amendment was in effect when Officers Mia and Cardall arrested petitioner in 1998. *Id.* The new statute, as explained by the *Moore* footnote, controls this case.

The 1984 version of Utah Code Ann. § 41-6-44.10 made submission of the officer's sworn report within 5 days "essential to the validity of the subsequent proceedings . . . for revocation." *Moore*, 750 P.2d at 206. Because the division had not provided evidence of the date of the submission, the Court of Appeals ruled that the revocation was a legal nullity. Since 1988, submission of the officer's report, is no longer essential to the validity of the revocation proceeding. It is neither an element that the respondent must prove nor a jurisdictional prerequisite, but, as this Court court stated in *Moore*, only a "matter of form."

> **We note that our decision today interprets section 41-6-44.10 as that statute existed in 1984, the time of appellant's arrest.** Since 1984, section 41-6-44.10 has been substantially amended. Now, this section reads in pertinent part:
>
> > (iii)... The peace officer shall submit a signed report, within five days after the date of arrest.
>
> Under this version of the statute, it is not the five-day requirement which begins the administrative revocation process and thus the argument that the five-day requirement is mandatory is weaker. **Now, the five-day requirement is more a matter of form as no substantial rights depend on its literal application.** The statute places the burden on the driver to make a written application for an administrative hearing within ten days after the date of the arrest. It is this time requirement that begins the administrative hearing process.

Id. at 206 n.1 (emphasis added and citation omitted).

The statute in effect when the police arrested petitioner, Utah Code Ann. § 41-6-44.10 (Supp. 1998), parallels the 1988 statute the *Moore* court discussed in the footnote.

Consequently, the five-day submission requirement does not begin the revocation process and no "substantial rights depend on its literal application." *Moore*, 750 P.2d at 206 n.1. Under the 1988 statute and the current statute, the revocation process began with the issuance and service of the citation. Utah Code Ann. § 41-6-44.10(2)(b) (Supp. 1988).[2] The five-day provision is merely a direction to the officer. It need not be proved in the trial de novo. This reading of the current statute simply makes sense. The word "shall" signifies a mandate, but not necessarily that a failure to meet its command strips an agency or a court of jurisdiction. The Texas courts of appeal have discussed a similar provision in their drivers' license code and have found that the direction to the officer is merely that, a mandatory direction to the officer, but not one that carries with it jurisdictional power. *Texas Dep't of Public Safety v. Gratzer*, 982 S.W.2d 88, 91 (Tex. App. 1998); *Texas Dep't of Public Safety v. Repschleger*, 951 S.W.2d 932, 934 (Tex. App. 1997).

> Although the word "shall" is generally construed to be mandatory, it may be and frequently is held to be merely directory. In determining whether the Legislature intended [that the word be] mandatory or merely directory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction. Provisions which are not of the essence of the

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[2] "[A] peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle." The 1984 statute made the submission of the sworn report the initiation of the proceeding. In 1988 and now the citation initiates the proceeding. Utah Code Ann. § 41-6-44.10(2)(e)(i) (Supp. 1998).

> thing to be done, but which are included for the purpose of promoting the proper, orderly and prompt conduct of business, are not generally regarded as mandatory.

Gratzer, 982 S.W.2d at 91.

Because *Moore* does not represent current law, and is, in fact, directly contrary to the only appellate court analysis of current law, the trial court's ruling is based on a mistake of law and should be reversed.

II. EVEN IF *MOORE* IS STILL A VALID INTERPRETATION OF THE LAW, THE ISSUE WAS NOT PROPERLY BEFORE THE COURT AND WAS WAIVED.

The method of judicial review also has significantly changed since *Moore*. In 1988, the Utah Administrative Procedures Act (UAPA) came into effect and changed the way courts review administrative actions. Under Utah Code Ann. § 63-46b-15(1)(a), district courts have jurisdiction to review by trial de novo informal adjudicative proceedings. These trials de novo must be initiated by a petition for judicial review. *Id.* Under UAPA, petitions are actually complaints governed by the Utah Rules of Civil Procedure. Utah Code Ann. § 63-46b-15(2)(a) (1996). The petition must include "facts demonstrating that the party seeking judicial review is entitled to obtain judicial review" and "a statement of the reasons why the petitioner is entitled to relief." Contrary to pre-UAPA practice in drivers' license matters, a petition for judicial review is not a bare-

bones request for a de novo hearing. It requires specificity in pleading that was not required under *Moore*. *See* Utah Code Ann. § 41-6-44.10 (1981) (amended 1988).[3]

Because it is a complaint governed by civil rules, and because UAPA expressly requires specific pleading of facts and reasons entitling a petitioner to relief, a failure to plead those matters constitutes waiver. Mabus did not state in his petition that he was entitled to relief because the officers missed, or may have missed, the 5-day deadline. Pursuant to normal civil rules, that issue is therefore waived and should not have been considered. *Wright v. University of Utah*, 876 P.2d 380, 384-85 (Utah App. 1994); *cf.* Utah R.Civ. P. 15(b) (1998) ("When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Respondent objected to consideration of this matter. Under those circumstances, the 5-day issue should have been considered waived by petitioner's failure to properly plead it. *Cf. Worrall v. Ogden City Fire Dep't*, 616 P.2d 598, 602 (Utah 1980).

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[3] Any person whose license has been revoked by the department ... shall have the right to file a petition within 30 days thereafter for a hearing in the matter in the district court. . . . Such court is hereby vested with jurisdiction, and it shall be its duty to set the matter for trial de novo . . . to take testimony and examine into the facts of the case and to determine whether the petitioner's license is subject to revocation under the provisions of this act.

Utah Code Ann. § 41-6-44.10(b) (1981) (amended 1988). This pre-UAPA appeal provision did not require any specificity in pleading. UAPA, on the other hand, requires it.

CONCLUSION

The trial court's order reinstating Mabus' license should be reversed and the matter remanded for it to enter an order based on the evidence adduced at the trial regarding Mabus's refusal to take the intoxilyzer test.

REQUEST FOR PUBLISHED OPINION

Because there have been no cases on this issue since *Moore* in 1989 and the DUI statute has changed, the division requests a published opinion.

RESPECTFULLY SUBMITTED 15 March 1999.

JAN GRAHAM
Utah Attorney General

James H. Beadles
Assistant Attorney General

CERTIFICATE OF MAILING

On 15 March 1999, a copy of this ***BRIEF OF APPELLANT*** was mailed, by U.S. Mail, postage prepaid, to:

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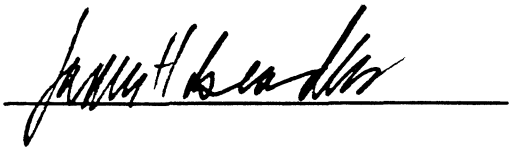

ADDENDUM

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IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

REML A. MABUS, Petitioner, vs. G. BARTON BLACKSTOCK, Bureau Chief Driver License Division, Department of Public Safety, State of Utah, Respondent.	ORDER VACATING ADMINISTRATIVE REVOCATION OF PETITIONER'S DRIVING PRIVILEGES CASE NO. 980902896 HONORABLE STEPHEN L. HENRIOD

THE ABOVE ENTITLED MATTER came before the Court on the 12th day of August 1998 before the Honorable Steven Henroid for Trial De Novo of the Utah Driver License Division's administrative order revoking Petitioner's driving privileges. The Petitioner was present and represented by counsel, D. Scott Little. Respondent was represented by the Utah State Attorney General's Office, James H. Beadles, Assistant Attorney General. The Department called one witness for the presentation of its case. Testimony was presented from Bountiful City Reserve Officer, Paul Neil Cardall and the Department rested. Petitioner testified and Bountiful City Officer Todd T. Miya was called for brief rebuttal. The Court being fully advised in the premises made its findings of fact, conclusions of law and order as follows:

FINDINGS OF FACT

1. Petitioner is a resident of Salt Lake County;

2. No evidence was presented that the peace officer submitted a signed report as required by Utah Code Annotated § 41-6-44.10(2)(d).

CONCLUSIONS OF LAW

3. This Court has jurisdiction to hear this case and venue is proper pursuant to Utah Code Annotated § 41-6-44.10(2)(i)(ii) and § 63-46b-15(1).

4. The failure of the peace officer to submit a signed report as required by Utah Code Annotated § 41-6-44.10(2)(d) is fatal to the revocation process.

ORDER

BASED UPON THE FOREGOING THE Order of the Department of Public Safety, Driver License Division revoking Petitioner's driving privileges is vacated and the Driver License Division is ordered to return Petitioner's driver license to him and show his driver license to be valid in its records.

DATED this 15 day of ~~August~~ Sept., 1998.

BY THE COURT:

Honorable Steven L. Henroid,
Third District Court Judge

DELIVERY CERTIFICATE

I hereby certify that I hand delivered a true and correct copy of the foregoing document, this 24th day of August, 1998, to:

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D. Scott Smith

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